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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-941

JOSEPH LUGOSCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IV. Has the Court of Appeals, in its judgment in this cause, without opinion, vitiated Petitioner's rights, under the Fifth and Sixth Amendments to the Constitution of the United States, to due process, effective assistance of counsel and meaningful right to jury trial when, in a trial of four (4) weeks, thirty-five (35) witnesses, and covering a transcript of two thousand seven hundred forty (2740) pages, it approved the action of the Federal District Court in limiting his argument to one (1) hour, especially after the Trial Court in its charge told the jury to determine which *side* was telling the truth. 3

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Joseph Lugosch, by his attorneys, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third (3rd) Circuit entered on December 13, 1972.

OPINION BELOW

The Order of the United States Court of Appeals for the Third Circuit is not reported and is printed as Appendix A, *infra;* the Court rendered no Opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, which is appended as Appendix B, was entered on the 13th day of December, 1972. The jurisdiction of this Honorable Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

I. Has the Court of Appeals, in its judgment in this cause, without opinion, vitiated the doctrine of *Russell v. United States*, 369 U.S. 749 (1962), that identity and character of the victim are at the very core of criminality, when it approved an indictment describing victims as "business concerns", and no specific human being was named as a "victim."

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IV. Has the Court of Appeals, in its judgment in this cause, without opinion, vitiated Petitioner's rights, under the Fifth and Sixth Amendments to the Constitution of the United States, to due process, effective assistance of counsel and meaningful right to jury trial when, in a trial of four (4) weeks, thirty-five (35) witnesses and covering a transcript of two thousand seven hundred forty (2740) pages, it approved the action of the Federal District Court in limiting his argument to one (1) hour, especially after the Trial Court in its charge told the jury to determine which *side* was telling the truth.

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IX. Has the Court of Appeals, in its judgment in this cause, without opinion, effectively prevented the Supreme Court of the United States from determining whether this case, with substantial Federal questions, presents those questions in such a manner that they are worthy of review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Fifth Amendment, Constitution of the United States, provides in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

II. The Sixth Amendment, Constitution of the United States, provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defense."

III. Title 18, U.S.C., Sec. 1951 (a) The Hobbs Act, provides, in part, "Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000.00 or imprisoned not more than twenty (20) years or both. (b) As used in this section . . . (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear or under color of official right."

IV. Rule 7(c) of the Federal Rules of Criminal Procedure provides, in part, "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

STATEMENT OF THE CASE

The Petitioner, Joseph D. Lugosch, and others, were indicted by the Grand Jury for the District of New Jersey in a nine (9) count indictment charging violations of 18 U.S.C., §1951, generally referred to as the "Hobbs Act" (Vol. I, p. 1)*. The first count of the indictment charged conspiracy and Counts II through IX charged substantive acts against certain business concerns. Lugosch entered his plea of not guilty on April 30, 1971. The Motion of Lugosch for Dismissal of the indictment was denied by Judge Augelli on June 28, 1971. Trial was had before Judge Garth and a jury. At the completion of the Government's case, Lugosch moved for judgment of acquittal on all counts; it was denied. Following testimony, Lugosch's application for judgment of acquittal on all counts was denied. The jury found the Defendant Musto guilty on all counts; Lugosch guilty on Counts I through V; not guilty on Counts VI through IX; and the Defendant Powers not guilty on all counts. On July 10, 1972, Lugosch was sentenced, and, thereafter, on July 10, 1972, a Notice of Appeal was filed. The Court of Appeals for the Third Circuit affirmed the judgment of the lower Court without an opinion on December 13, 1972.

Explanatory Note

* The transcript of the trial proceedings are contained in Volumes III through XII of the Appellant's Joint Appendix in the third circuit. Since the pages of the trial proceedings are numbered consecutively, reference in the petition to the trial proceedings will hereinafter omit specific volumes and the Appellant will refer to the page numbers as "(T.____)". Reference to proceedings other than the trial will hereinafter be designated by both volume and page reference. Excerpts of testimony at trial, with appropriate transcript page numbers, are printed in Appendix C, *infra*.

PORTIONS OF THE TRIAL

At trial, the Government called Peter P. Savarine, Secretary to the Board of Education of Union City, New Jersey, who explained how the Board of Education solicited bids, awarded contracts and issued payments (T. 264-266, 380-382). Affidavits of contractors were required prior to payment stating that no member of the Board had any financial interest in any portion of the money to be paid (T. 572). Sealed bids were opened at a public meeting and the bid was awarded to the lowest responsible bidder (T. 535, 538). The lowest bidder always received the bid from the Board of Education.

THE ALLEGED EXTORTION OF THE CONTRACTORS

Arthur Sitterle, owner of an electrical contracting firm, was contacted by Lugosch to do business with the Board (T. 1103-1104). One of the requirements discussed for doing business was between 5% and 10% (T. 1105), which was to be given to Lugosch (T. 1106). After Sitterle performed the work, Lugosch would place a figure on a sheet for the boys (T. 1108), the figure being between 5% and 10%. Sitterle would revise and recompute his time and material and then submit a higher bid or bill (T. 1108). When there was a figure for the boys, he revised the labor and material figures to correspond with that figure and, thus, raised the price which he charged to the Board (T. 1110). He gave Lugosch cash (T. 1110). He had been submitting false statements to the Board (T. 1126) and, at the time submitted, he knew he was overcharging the Board (T. 1127); he stated, "Well, I actually never thought about what would happen if I didn't do it."

(T. 1137). Tugosch told him the money was for the boys and he never saw Tugosch take any himself (T. 1143-1144). He received other business from the Board, but he did not give any money to Tugosch (T. 1140). Tugosch never told him what would happen if he stopped making payments (T. 1143).

Armand Bartolucci, of Bartolucci & Son, Inc. (T. 1159), recalled a conversation with Tugosch or his partner (T. 1164-1165). One of them said if he did work for the Board, certain monies, somewhere between 5% and 10%, should be returned (T. 1168-1169). The procedure would be Malenka, or possibly Tugosch, gave Bartolucci a figure to put on the job. Bartolucci reviewed and reestimated the costs, labor and material, and submitted the higher bid to the Board (T. 1169-1174), through Tugosch (T. 1172). He made no payments on competitive bid contracts (T. 1241). Tugosch mentioned that the money was for the boys, but they were not identified (T. 1176-1177). The payments were voluntary but he felt he would not get the work if he did not pay (T. 1187). This is a practice that just continued (T. 1216), a way of doing business, a way of life (T. 1186). They were voluntary on the assumption they were necessary, as an assumed favor, in order to get future business (T. 1187, 1246), he realized that only the lowest bidder would get the contract (T. 1241). The payments were made from Bartolucci's personal salary (T. 1177).

After Malenka passed on, Bartolucci went to Tugosch and asked whether the same procedures would continue (T. 1198). Tugosch later indicated, that if this was going to stop, you people have to stop it (T. 1199). Tugosch never threatened him, or demanded money from him (T. 1215, 1216), such business practices were merely

a way of life (T 1201). Lugosch would accept the sealed envelope and never opened it (T 1201-1202). The payments included money for political contributions as well (T 1246), he did not return any money on a number of projects received from the Board (T 1232-1236). Lugosch told Bartolucci that he didn't have to continue making payments if he didn't want to (T 1239-1240). The affidavits were false, and no money was taken from corporate funds (T 1189, 1240). Any payments made came from his personal pocket (T 1240). He made no payments on competitive bid contracts (T 1241).

Andrew F. Pascale, a plumber, had a conversation with Lugosch or one Malenka concerning work done for the Board (T 1354, 1355). Lugosch never stated that he would receive no business from the Board if payments were not made (T 1379). Pascale thought that he might not receive any business, it was a way of doing business (T 1379-1382). Lugosch never made any promises for future work if the rebates were given (T 1383), it just went on (T 1383). Pascale believed that in order to get work you had to give money (T 1359). Pascale would estimate the costs on a job and then review this with Lugosch who would place a figure of either 5% or 8% on paper. Pascale reestimated the costs by the 5% or 8% and then submitted the raised bid to the Board (T 1356, 1371). He did not realize that it was illegal to continue the practice by raising the bill to the Board (T 1373), he continued to do business by altering and raising his prices (T 1375) to the Board. When he received payment he would give the rebate money to Lugosch in an envelope (T 1384). Lugosch never demanded or requested Pascale to pay any of the money (T 1379). Pascale knew that when he was the lowest bidder, he received the bid (T 1377).

Charles Antinori, a partner in Antinori Brothers (T. 1390), said the contracts would be given to the lowest responsible bidder (T. 1462-1465). Antinori believed all bids were awarded to the lowest bidder (T. 1465); that Lugosch requested he include 10% to his bid as kickback (T. 1394). Lugosch never demanded any money from Antinori although far back he was told, he thought, it was said he wouldn't get business unless kickbacks or envelopes were forthcoming (T. 1495). Lugosch stated that the only way that this type of operation could be halted would be if the contractors got together and stopped it (T. 1495-1496). He increased his billings to the Board in order to make the payments (T. 1499, 1500). Antinori never suffered any financial loss with respect to any of the payments (T. 1500). The affidavits which he had signed were false (T. 1451-1452).

The Government also called the vendors who were listed in the indictment as well as other individuals who had allegedly been extorted but who were not named in the indictment. While each testified that they gave money, some stated, for instance, that there was never any pressure placed on them that prevented him from ceasing to make payments (T. 902, 1078-1079) and most of the vendors did not even know the Petitioner (T. 761, 1073, 1100).

THE ALLEGED CONFESSION

Agent Pino of the FBI was heard outside the jury (T. 1556). Pino saw Lugosch on two occasions; the first was in the latter part of October 1970 in the office of the U.S. Attorney, and the second was in Lugosch's office on December 9, 1970 (T. 1557-1559). On the second occasion, Lugosch was advised at the outset of the interview

that he was a possible target or a subject of an investigation that was being conducted, and Lugosch was then advised of his constitutional rights (T. 1559). At the first interview, which occurred in the office of the U.S. Attorney, Mr. Heifetz, after the U.S. Attorney called Lugosch to come to his office (T. 1610), Lugosch was reluctant to admit his involvement with any conspiracy (T. 1584). Lugosch admitted his involvement after it was stated that the interview would be "off-the-record" (T. 1571-1584). Pino could not remember whether anyone advised Lugosch of his rights during the interview; Lugosch did not sign a waiver of his rights (T. 1574). As Lugosch went into the details of his involvement (T. 1575) the U.S. Attorney continued to make scratched notations (T. 1575). Lugosch revealed that he had been a part of a scheme and had received monies and turned them over to former members of the Board and to one current member (T. 1574). He received money from contractors and he discussed Antinori Brothers' involvement as well as payments which he made to Spano (T. 1576, 1577, 1579). Heifetz did not advise Lugosch of his rights (T. 1579). The names of Bartolucci, Sitterle and Pascale were mentioned at the first interview (T. 1583). The word "kickback" was first used by the agents (T. 1584); Lugosch said that he received kickbacks from these contractors (T. 1584, 1591). At the second interview, which was from one to three weeks after the first (T. 1572), the same topics were discussed and the same individuals were mentioned as at the first interview (T. 1576, 1577, 1580, 1583). The second interview was a product and a combination of both the first and second interviews (T. 1585, 1586, 1587, 1588); the second interview was a combination of the two interviews (T. 1591). Pino stated that the same questions were asked at both interviews (T. 1587). The agent was not

aware of the chain of payments until after they had spoken to Lugosch at the first interview (T. 1589). At the first interview they had information which would have implicated Lugosch (T. 1594). The second interview was in more detail while the first was mainly that Lugosch was involved (T. 1584, 1585, 1590).[1]

Agent Vaccarino of the FBI also testified outside the presence of the jury (T. 1598). Lugosch's name had come up prior to the first meeting (T. 1599). The purpose was to permit the strike force attorney to talk to Lugosch (T. 1620). At the second interview, he advised Lugosch of his rights and Lugosch signed a waiver (T. 1601, 1602, 1605). The first meeting was "off the record" with the U.S. Attorney (T. 1610) and the agent did not advise him of his rights (T. 1611). The second interview occurred in Lugosch's office while Lugosch was on his way to the hospital (T. 1603, 1614).

Lugosch outside the jury related there was no mention of any constitutional rights by the U.S. Attorney (T. 1623) but Lugosch was informed by Heifetz that he was a target of the investigation (T. 1623); he was told that he would either supply information or would be a target (T. 1624). Lugosch consented and listed names of parties who were involved and to whom money was paid (T. 1624-1626). Heifetz continued to take notes on the matter (T. 1625). At the second interview the same topics were discussed (T. 1627-1629); the second interview covered generally everything the first interview covered (T. 1627). The agents insisted they had to meet with Lugosch although Lugosch explained that he was on his way to the hospital to have a hydrocele on his testicle removed (T. 1630, 1631); he objected to such a meeting the day before (T. 1635). The agents began discussing

[1] Before the jury, the agent advised that Lugosch was told by the United States Attorney at the first interview that *if he cooperated fully the Government had the option of not prosecuting him* (T. 1714) [Emphasis supplied].

the information which had been discussed at the first interview (T. 1635). Throughout this period, he answered phone calls (T. 1649).

The Court ruled that the Appellant's rights were adequately protected, and overruled objections to the alleged inculpatory statements which were made to the Government agents (T. 1693-1699).

REASONS FOR GRANTING WRIT AND QUESTIONS PRESENTED FOR REVIEW

I. **HAS THE COURT OF APPEALS, IN ITS JUDGMENT IN THIS CAUSE, WITHOUT OPINION, VITIATED THE DOCTRINE OF *RUSSELL v. UNITED STATES*, 369 U.S. 749 (1962), THAT IDENTITY AND CHARACTER OF THE VICTIM ARE AT THE VERY CORE OF CRIMINALITY, WHEN IT APPROVED AN INDICTMENT DESCRIBING VICTIMS AS "BUSINESS CONCERNS", AND NO SPECIFIC HUMAN BEING WAS NAMED AS A VICTIM**

In the first paragraph of Count I of the Indictment (Vol. I, p. 12), the complaining witnesses are listed as "business concerns"; only as to Bartolucci, Siegel and Adelman's are they listed as corporations. The legal status, if any, of the others is left to the imagination of the reader. There is no specific human being named as a "victim."

The Appellant joined a Motion to Dismiss the Indictment and joined in the argument of the Defendants Musto and Powers (Vol. II, p. 51). The Trial Court's attention was invited to the proposition that the Indictment charged offenses against mythical bodies and not persons (Vol. II, p. 11; Vol. II, p. 51). Where an Indictment does not particularize individuals it is insufficient to justify a judgment

of conviction. See: *Lauer v. United States*, 320 F.2d 187 (7th Cir., 1963); *Larkin v. United States*, 107 F. 697 (7th Cir. 1901). In *Larkin, supra*, the defendant was charged with sending postcards through the mail to Phelps & Bigelow Wind-Mill Company in pursuance of a scheme to defraud. It was implied that an indictment is defective if it fails to describe by name the individuals or class who are defrauded. The Court observed, "it is not shown whether Phelps & Bigelow Wind-Mill Company was a co-partnership or a corporation." 107 F.2d at 701. In *Bates v. State*, 124 Wisc. 612, 103 N.W. 251 (1905), an Information charged that the defendant secured money from H. P. Proctor & Son by means of false representation. It was held that the indictment was insufficient on its face since it failed to specify any person who was deceived. The Court indicated that "H. P. Proctor & Son mean nobody." See also: *People v. Hobbs*, 352 Ill. 224, 185 N.E. 610 (1933), and *United States v. Weber*, 71 F. Supp. 88 (D.C. Ill., 1947), where the indictment merely stated "Andrew Company." In *United States v. Floyd*, 228 F.2d 913, 915 (7th Cir., 1956), the Court observed:

> "Without analyzing these cases, we think it may be conceded that they furnish support for the contention that the indictment would be insufficient if it alleged nothing more than that threats were made to the 'contractors' and that the 'contractors' were the victims thereof."

It is respectfully submitted by this Appellant that there is little difference between "the contractors" and "business concerns" in this case at Bar. See also:

> *United States v. Callanan*, 113 F. Supp. 766 (D.C. Mo., 1953).

United States v. Bennett, 36 F.R.D. 103 (D.C. So. Car., 1964).

In the case at Bar only three (3) of the eight (8) "business concerns" listed in the Indictment are specified as corporations. Although it is conceded that a corporation is a legal entity, the Appellant is given no additional information by this identification: how is he to determine who has been extorted? Is it the president, vice president or is it, in fact, the corporation's funds itself which were allegedly taken?

Three (3) of the complaining witnesses in the case at Bar are identified only as corporations and the remaining five (5) are identified only as business concerns; as to them one does not know whether they are partnerships, individuals trading as, or what have you. The identity and character of the victim are at the very core of criminality. *Russell v. United States*, 369 U.S. 749 (1962). Without proper identification of the alleged victims the prosecution has the power to roam at large in a fashion not permitted. In Appellant's view, "business concerns" denominated in Count I, are a legal non-entity.

In *United States v. Cruikshank*, 92 U.S. 542, 558 (1875), the Court specifically held:

> "Every ingredient of which the offense is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, – it must descend to

> particulars . . . A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances . . ."

See also, *Russell, supra*, at 765.

It is obvious that the indictment in the case at Bar did not protect Defendant Lugosch from jeopardy. For instance, business concerns are legal non-entities, and on each succeeding occasion the Government could produce another alleged agent of the business concern and say that he was the individual extorted or defrauded and make a new case.

The Indictment in the case at Bar is vague and nebulous in that it does not set forth the amounts of funds which were allegedly taken nor the dates when the funds were taken, nor does it specify with any reasonable particularity from whom the funds were taken. See: *United States v. Cruikshank, supra*. In *Hagner v. United States*, 285 U.S. 427 (1932), the sufficiency of the indictment was not challenged prior to trial, but was challenged in a post-verdict Motion in arrest of judgment. The Indictment in this cause is reasonably analogous to the Indictment charged in *United States v. Tomasetta*, 429 F.2d 978 (1st Cir., 1970). In that case, the Court reversed the conviction holding it was error not to name the victim of the offense under the circumstances. While it is conceded that in the case at Bar a corporation and/or business enterprises are listed, it is the position of the Appellant that the rationale of *Tomasetta, supra*, should apply to this case. In *United States v. Addonizio*, 451 F.2d 49 (3rd Cir., 1972) the Court noted, at p. 59, "The sixty-three substantive counts alleged payments of specific sums at specific times (fifty-four name the recipient as well)." The Indictment

at Bar does not show the place, from whom the money was taken, or, indeed, that the amount was one cent or one million dollars.

II. HAS THE COURT OF APPEALS, IN ITS JUDGMENT IN THIS CAUSE, WITHOUT OPINION, VITIATED THE DOCTRINE OF *BRAM v. UNITED STATES*, 168 U.S. 532 (1895) AND *SHOTWELL MFG. CO. v. UNITED STATES*, 371 U.S. 341 (1963), THAT A CONFESSION MAY NOT BE OBTAINED BY PROMISES OR INDUCEMENTS OF HOPE, WHEN IT APPROVED A CONFESSION SECURED IN A SUBSEQUENT INTERVIEW AFTER THE PETITIONER, IN AN INITIAL INTERVIEW, HAD BEEN TOLD (a) HIS DISCUSSION WAS OFF THE RECORD, (b) IF HE COOPERATED FULLY THE GOVERNMENT HAD THE OPTION OF NOT PROSECUTING HIM, AND (c) WAS NOT GIVEN ANY *MIRANDA* WARNINGS.

Agent Pino related a confession given by Mr. Lugosch on or about December 9, 1970 (T. 1741, 1742). Prior to this interview, Mr. Lugosch had been called by the Assistant United States Attorney to come to his office to discuss things regarding the Union City Board *off the record* (T. 1610, 1574). At the first interview which took place a week or two, or more, before the interview of December 9, 1970 (T. 1693) the government knew of Mr. Lugosch's involvement (T. 1585). Lugosch was told at the first interview that *if he cooperated fully the government had the option of not prosecuting him* (T. 1744). (Emphasis supplied).

The issue may be summarized as follows:

1. The confessions at the second interview were a product, according to the agents, of

the first interview where Lugosch had not been advised as to his rights (T. 1611, 1574).

II. The second interview was a combination, according to the agents, of both interviews (T. 1586).

III. At the second interview, the same topics, were discussed and the same individuals were mentioned as at the first interview (T. 1576, 1577, 1580, 1583).

IV. The second interview, the one related in Court, was a product and a combination of both the first and second interviews (T. 1585, 1586, 1587, 1588).

V. The same questions were asked at both interviews (T. 1587).

VI. The Government was not aware of the alleged chain of payments until they had spoken with Lugosch at the first interview (T. 1589).

Where one confession is involuntary and inadmissible, a presumption exists that any subsequent confession was made by reason of the prior influence, and this presumption must be overcome by the government before a subsequent confession can be offered. The improper influence which produced the first confession is presumed to be still in effect until a cessation of that influence is definitely shown, and the evidence to overcome and rebut such a presumption must be clear, strong and satisfactory and any doubt on this point is resolved in favor of the accused. *Edwards v. State*, 194 Md. 387, 71 A.2d 487 at 493 (1950), Compare *Beecher v. Alabama*, 389 U.S. 35 (1967).

Although Lugosch was advised of his rights at the second interview, he was at no time told that the prior promise "if he cooperated fully that the government had the option of not prosecuting him," had been withdrawn (T. 1744).

In *Bram v. United States*, 168 U.S. 532 (1895) the Court stated that it is the general rule that a confession must be free and voluntary, that is, not produced by inducements engendering either hope or fear. *Bram, supra*, at 540. Citing cases at 541, the *Bram* Court noted inducements sufficient to exclude a confession: some are (1) advising the prisoner to make full restitution and saying, "If you do so, it will go easy with you. It will be better for you to confess. The door of mercy is open and that of justice is closed." (2) "The suspicion is general against you, and you had as well tell all about it. The prosecution will be no greater. I don't expect to do anything with you. I am going to send you home to your mother." The *Bram* Court held that a confession must not be the result of either hope or fear operating on the mind of the accused.

While there is a period of time from the first interview where Lugosch did not receive his warnings and was told the interview was off the record until the second interview where he was, in fact, given his Miranda rights, that hiatus is not completely controlling. It must still appear that the conditions which prompted the statement had been removed. Cf.: *United States v. Bayer*, 331 U.S. 532, 541 (1947). Where a defendant is brought before a United States Attorney and two FBI agents for an *off the record* conversation, is told that the government has the option of not prosecuting if he cooperates fully, and is not warned of his rights, then it is the burden of the government to

show, in a strong and satisfactory manner, with any doubt being resolved in favor of the accused, that all of these inducements have been removed. Certainly, it would be reasonable for Lugosch to believe that two of the inducements still remained (1) that the matter was still off the record, and (2) that if he cooperated fully, the government had the option of not prosecuting him.

The confessions related at trial were not voluntary in that they were obtained by direct and implied promises of an improper nature. *Lynum v. Illinois*, 372 U.S. 528 (1963); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Lisenba v. California*, 314 U.S. 219, 241 (1941). Indeed, the practice utilized by the United States of telling a probable defendant that conversations were to be off the record and that if he cooperated fully the government had the option of not prosecuting him, could indicate to a reasonable man that there was a confidential purpose in the interviews between the defendant and the representatives of the United States. *Killough v. United States*, 336 F.2d 929 (D.C. Cir., 1964). *The controlling test is that a confession may not be obtained by direct or implied promises, however slight. Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963).[1] (emphasis supplied)

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[1] It has been held that inquiry into the voluntariness of a confession necessarily involves the *confessor's* state of mind. A confession is involuntary in the legal sense if it was elicited by the *confessor's belief* that a reciprocal promise had been made to him, whether, in fact, any such promise was made. *United States v. Harris*, 301 F. Supp. 996, 999 (D.C. Wis., 1969). At bar, this Appellant actually need not go this far, for the Trial Judge found the obvious fact that the inducement was made (T. 1694). (Emphasis supplied).

III. HAS THE COURT OF APPEALS, IN ITS JUDGMENT IN THIS CAUSE, WITHOUT OPINION, VITIATED THE DOCTRINE OF *STIRONE v. UNITED STATES*, 361 U.S. 212 (1960), THAT THE PROOF MUST SHOW THE INTERSTATE COMMERCE OF THE VICTIM WAS BURDENED BY THE ALLEGED EXTORTION, WHEN IN THIS CAUSE THE MONIES ALLEGEDLY TAKEN CAME FROM OVER CHARGES AND FALSE INVOICES TO A BOARD OF EDUCATION (NOT NAMED IN THE INDICTMENT AS A VICTIM), OR FROM PERSONAL FUNDS OF OFFICERS OF "BUSINESS CONCERNS."

The Government's theory that the funds came from over charges to the Board of Education (T. 212) or from the personal funds of officers of corporations, or that there was no personal financial loss as in the case of Antinori, subjected this Defendant to a prosecution for interference with interstate commerce, which the Grand Jury did not charge. *United States v. Critchley*, 353 F.2d 358 (3rd Cir., 1965), *Stirone v. United States*, 361 U.S. 212 (1960).

Antinori increased his billings to the Board in order to make the payments; he never suffered any financial loss (T. 1499-1500). Bartolucci stated that the payments were made from his salary (T. 1177). The payments were from his pocket, out of personal funds (T. 1240). Sitterle revised his bills and submitted higher bids or bills to the Board of Education (T. 1108-1110). He was overcharging the Board (T. 1127). Rassner paid funds from his personal income (T. 955).

Extortion involves payment in return for something to which the payor is already legally entitled. *Addonizio, supra*, at p. 72. The contractors who raised bids to the Board were not legally entitled to the monies that the Board paid

on the basis of these fraudulent bids or billings. Thus, in those situations any commerce that was burdened was the commerce of the Board of Education and not of the contractors. Thus, Lugosch was convicted of a crime for which he was not even indicted.

IV. HAS THE COURT OF APPEALS, IN ITS JUDGMENT IN THIS CAUSE, WITHOUT OPINION, VITIATED PETITIONER'S RIGHTS, UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, TO DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL AND MEANINGFUL RIGHT TO JURY TRIAL WHEN, IN A TRIAL OF FOUR (4) WEEKS, THIRTY-FIVE (35) WITNESSES, AND COVERING A TRANSCRIPT OF TWO THOUSAND SEVEN HUNDRED FORTY (2740) PAGES, IT APPROVED THE ACTION OF THE FEDERAL DISTRICT COURT IN LIMITING HIS ARGUMENT TO ONE (1) HOUR, ESPECIALLY AFTER THE TRIAL COURT IN ITS CHARGE TOLD THE JURY TO DETERMINE WHICH *SIDE* WAS TELLING THE TRUTH.

Considering the number of witnesses who testified, the complexity of the issues, and that a substantial question was raised as to credibility of many of those witnesses, it was unreasonable for the Trial Court to have limited the argument for this Petitioner.[2]

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[2] Reasonably, the trial advocate, if he wanted to discuss the testimony of each witness (which was tendered by the Court), would have less than two (2) minutes per witness, with no time for an appeal to the hearts of the jurors on the law. This substitutes computers for the human elements of our system.

The trial of this matter took weeks; it covered many witnesses; there was much testimony and voluminous documents, all of which the Appellant had a legal right to have his counsel discuss. Further, the Trial Court told the jury (T. 3703) a basic question was to determine whether the government's witnesses are telling the truth or whether the Defendants and their witnesses are telling the truth. In order for counsel to convince the finder of fact as to who is telling the truth it is necessary, in cases such as this, to examine the testimony of witnesses in detail.

For example, the testimony of Castorino fell apart when one examines closely his financial situation and apparently the fact that much of the monies that were allegedly extorted found their way into Castorino's pocket. Conversely, Lugosch had an explanation for the monies that he had in his bank account, and, indeed, had paid tax on them and had not hidden them. All of these were matters of argument and matters of persuasion, but in view of the limiting instructions by the Trial Judge, Petitioner's counsel was unreasonably limited in discussing the significance and quality of each witness' testimony. It is difficult to convince the finder of fact as to whose witnesses were telling the truth when the Trial Judge gives such a limited period of time to counsel.

The right of closing argument is a constitutional right and in many cases the cause can be won or lost in final argument. Such, certainly, was the case at Bar where the evidence, if properly understood by the jury, would have shown that under no circumstances could the Petitioner have been guilty since the only persons who were "extorted" were not the "persons" named in the indictment but was, in fact, the Union City Board of Education. In addition, there was a factual question of whether bribery

occurred rather than extortion; there were the tangled financial affairs of Castorino, the fact that many of the witnesses had testified they previously had submitted false affidavits, under oath, to the Board. In order to protect the rights of Lugosch, all of these were factors which should have been discussed in great detail, *Rossi v. United States*, 9 F.2d 362 (8th Cir., 1925). In *Rossi*, counsel asked for thirty (30) minutes and was granted fifteen (15) minutes, and the Court held the fifteen (15) minute allowance to be error. There were thirteen (13) witnesses and the evidence covered fifty-four (54) printed pages of record.

In *People v. Green*, 99 Cal. 564, 34 P. 231 (1893), where there were twenty-four (24) witnesses in a trial of five (5) days, the Court held that a limitation of one (1) hour for closing argument was unreasonable. In *State v. Rogoway*, 45 Or. 601, 81 P. 234 (1905) and *People v. Labadie*, 66 Mich. 702, 33 N.W. 806 (1887), one (1) hour limitations were held unreasonable.

Where the Court tendered a basic dichotomy, Counsel should have been allowed more time to review, in detail, the assertions of the witnesses on both direct and cross-examination in order to persuade the jury, in accordance with the Trial Judge's command, as to which *side* was telling the truth.

Such limitation of closing argument under the circumstances was, it is respectfully suggested, an abuse of sound judicial discretion, and a total rejection of the right of effective assistance of counsel and a meaningful jury trial.

V. HAS THE COURT OF APPEALS, IN ITS JUDGMENT IN THIS CAUSE, WITHOUT OPINION, VITIATED THE DOCTRINE OF *DAVIS v. UNITED STATES*, 160 U.S. 469 (1895) AND CONFLICTED WITH THE JUDGMENT IN *LAMBERT v. UNITED STATES*, 101 F.2d 960 (5th Cir., 1939), BOTH OF WHICH REQUIRE THAT REASONABLE DOUBT OR CONVICTION MUST BE DETERMINED ON ALL THE EVIDENCE, WHEN IT APPROVED THE CHARGE BY THE FEDERAL DISTRICT COURT THAT, "A BASIC QUESTION FOR YOU TO DETERMINE IS WHETHER THE GOVERNMENT'S WITNESSES ARE TELLING THE TRUTH OR WHETHER THE DEFENDANTS AND THEIR WITNESSES ARE TELLING THE TRUTH." IN ESSENCE, TENDERING A BASIC DICHOTOMY BY REQUIRING ONE SIDE TO OUTBALANCE THE OTHER.

The Trial Court instructed the jury:

> "A basic question for you to determine is whether the Government's witnesses are telling the truth or whether the Defendants *and their witnesses* are telling the truth." (T. 3702-3703). (Emphasis supplied).

When the instruction of the Trial Judge is read fully and in context, then it is recognized that the Trial Judge may have misled the jury, albeit unconsciously, for a criminal trial is not determined on the basis of *whose side* is telling the truth, but on the basis of an understanding and status of the evidence as a whole. *Davis v. United States*, 160 U.S. 469, 485-486 (1895). The jury in a Federal criminal trial is a factual epicurean. It may pick and choose and digest that which is most palatable, irrespective of which side the testimony comes from. The charge, in essence, ameliorated the burden of proof on the government.

It was stated in *Davis, supra,*

> "The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive grounds of defense by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot, in the very nature of things, be regarded as proved, if the jury entertain a reasonable doubt from *all the evidence* whether he was legally capable of committing crime." (Emphasis supplied). *Id.* at 485-486.

It is perhaps instructive to note that the Court in *Lambert v. United States,* 101 F.2d 960 (5th Cir., 1939) held that it was error for the Trial Court to charge that the Defendant's evidence must balance or outweigh the evidence presented by the Government. The Court continued: "It is erroneous because it in effect requires the defendant to acquit himself, rather than requiring the Government to convict him." *Id.* at 964. Likewise, in the instant case, it is apparent that the Court's instruction placed the burden on the Appellant by requiring that he acquit himself through his presentation. The instruction required the jury balance the Government's evidence with the defense evidence and determine if one outweighed the other.

VI. HAS THE COURT OF APPEALS, IN ITS JUDGMENT IN THIS CAUSE, WITHOUT OPINION, VITIATED THE DOCTRINE OF *KOTTEAKOS v. UNITED STATES*, 328 U.S. 750 (1946), THAT IF THE EVIDENCE PERMISSIBLY SHOWS TWO ALLEGED CONSPIRACIES A DEFENDANT CANNOT BE CONVICTED IF THE INDICTMENT CHARGES ONLY ONE, WHEN IT APPROVED THE ACTION OF THE FEDERAL DISTRICT COURT IN NOT GIVING A MULTIPLE CONSPIRACY CHARGE.

The Trial Court was requested to submit to the jury the question of whether there was more than one conspiracy, and it declined to do so (T. 3575, 3163, 3243). The jury when it found Defendant Lugosch guilty on Courts I through V and Defendant Musto guilty on Counts I through IX, *could* have found there were two conspiracies. The Trial Judge charged the jury (T. 3727) that if any conspirator committed an act in furtherance of the conspiracy that act was binding as to the conspiracy count upon all persons who became members of the conspiracy. This must be contrasted with the Trial Judge's charge at T. 3746:

> "Now, I further instruct you that the law provides that two or more persons have entered into a conspiracy and one of the co-conspirators commits a criminal offense in furtherance of that conspiracy, all the persons who are members of the conspiracy at the time the act was committed are guilty of that *other offense*. Therefore, if you find that any or all of the Defendants were members of the conspiracy alleged in Count I, and if you find that any or all of these substantive acts of extortion alleged in the substantive

> Counts II through IX were committed by one or more of the members of the conspiracy in furtherance of the conspiracy, you may find those of the Defendants who were members of the conspiracy at the time of the act or acts of extortion guilty of the extortion or extortions directly committed by any one or more of them." (Emphasis supplied).

Thus, under the Court's charge, if, the Defendant Musto and Lugosch were guilty of a single conspiracy then both would be guilty of any substantive acts committed by the other, or any other member of the conspiracy. The jury, however, found that Lugosch was not guilty of any substantive acts in Counts VI through IX. It follows, therefore, that there *may* have been, at least, two separate conspiracies. *Kotteakos v. United States*, 328 U.S. 750 (1946). There was no head of the scheme, no evidence of close cooperation, no evidence of common control; indeed the separate conspiracies as to the contractors on the one hand and vendors on the other could have operated separately (T. 207). On the evidence, the jury *could* have found more than one conspiracy. You cannot charge one conspiracy, and the evidence permissibly show two. If, in fact, the jury would find two conspiracies then under this indictment Lugosch would be acquitted. *Kotteakos v. United States, supra;* this is significant because much of the conversation admitted with unindicted co-conspirators occurred prior to the conspiracy charged in the indictment. See *e.g.*, T. 770-771.

VII. HAS THE COURT OF APPEALS, IN ITS JUDGMENT IN THIS CAUSE, WITHOUT OPINION, REACHED A CONTRARY RESULT FROM THAT REACHED IN *UNITED STATES v. MILLER*, 340 F.2d 421 (4th Cir., 1965) AND *PEREZ v. UNITED STATES*, 297 F.2d 12 (5th Cir., 1961) WHEN IT APPROVED THE ACTION OF THE FEDERAL DISTRICT COURT IN REFUSING A CHARGE ON BRIBERY WHEN THE DEFENDANT'S TESTIMONY AND PROOF SHOWED NO THREATS OF ECONOMIC HARM; THAT IS TO SAY, AS A MATTER OF FEDERAL PRACTICE, IS NOT A DEFENDANT ENTITLED TO A CHARGE WHICH PRECISELY AND SPECIFICALLY, RATHER THAN GENERALLY AND ABSTRACTLY, POINTED TO ONE OF HIS THEORIES OF DEFENSE.

The Trial Court was requested to charge the jury as to the law of bribery (T. 3575). Under the circumstances of this case the payments of these monies, if any, to the Defendants as found by the jury, could amount to bribery by the complaining witnesses, not extortion by the Defendant. Where there is no proof to show that the Defendants had threatened any of the contractors or suppliers with economic harm unless the payments continued, then the offense would be bribery. *United States v. Miller*, 340 F.2d 421 at 425 (4th Cir., 1965).

It is respectfully submitted, under the authority of *People v. Feld*, 262 App. Div. 909, 28 N.Y. Supp. 2d 796 (1941) and *People v. Dioquardi*, 8 N.Y. 2d. 260, 168 N.E. 2d 683 (1960) that the Defendant was entitled to have the jury instructed that if the contractors or suppliers were guilty of bribery, then the Defendant could not be guilty of extortion. Where, as here, the record is devoid of *compulsion* by Lugosch, and where, in fact, compulsion is a distinguishing factor between extortion and bribery, then the issue should have been clearly and properly

tendered to the jury under proper instructions, because bribery and extortion are mutually exclusive. *People v. Feld, supra; People v. Dioquardi, supra; Hornstein v. Paramount Pictures,* 292 N.Y. 468, 55 N.E. 2d 740 (1944). It is the Appellant's position that he was entitled to a charge which precisely and specifically, rather than generally or abstractly, pointed to one of his theories of the defense. *Perez v. United States,* 297 F.2d 12 (5th Cir., 1961); *United States v. Gilbreath,* 452 F.2d 992 (5th Cir., 1971); *Levine v. United States,* 261 F.2d 747 (D.C. Cir., 1958).

VIII. HAS THE COURT OF APPEALS, IN ITS JUDGMENT IN THIS CAUSE, WITHOUT OPINION, MISAPPLIED THE PURPOSE AND INTENT OF THE HOBBS ACT AND CONFLICTED WITH THE OPINIONS IN *UNITED STATES v. KENNEDY,* 291 F.2d 457 (2nd Cir., 1961) AND *CALLANAN v. UNITED STATES,* 223 F.2d 171 (8th Cir., 1955) WHEN IT APPROVED THE ACTION OF THE FEDERAL DISTRICT COURT IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL WHEN THERE WAS NO EVIDENCE OF ANY REASONABLE FEAR BY THE ALLEGED VICTIMS.

Under the Hobbs Act, 18 U.S.C., §1951, it is required that the defendant induce his victims to part with property, that the victim does so through the use of fear, and that in doing so there is an adverse effect upon interstate commerce. *United States v. Addonizio, supra.* The Act requires that the Defendant induce his victim to part with property through fear and the jury is permitted to find such inducement from testimony as to the state of mind of the victim, *United States v. Tolub,* 309 F.2d 286 at 289 (2nd Cir., 1962). The state of mind must spring

from action by the Defendant, *United States v. Kennedy*, 291 F.2d 457 (2nd Cir., 1961), but there still must be some form of compulsion, *Nick v. United States*, 122 F.2d 660 at 671 (8th Cir., 1941). In this regard, Appellant respectfully invites the attention of the Court to *People of the State of New York v. Dioquardi*, 8 N.Y. 2d 260, 168 N.E. 2d 683 (1960). It is the position of Appellant that the above cited case supports his position that while fear of economic injury is sufficient to establish a violation of the Hobbs Act, and that it may not be essential that the Defendant personally create the fear existing in the mind of his prospective victim, it is still necessary that the Defendant himself persuade the victim that he, the Defendant, possesses the power to remove or continue the cause of the fear or that he instills a new fear by threatening to misuse that power as a device to exact tribute.

There is no testimony that any individual or corporation, or partnership named or unnamed, lost any account with the Board in the past because they did not pay rebates. Indeed, all seemed to be aware that the lowest bidder got the job. The "state of mind" of the business community was devoid of compulsion or fear, but aware that the lowest bidder prevailed (T. 462, 668, 711, 723, 796, 899, 900, 937, 983, as examples).

Antinori believed that all bids were awarded to the lowest bidder (T. 1465). Lugosch never demanded any money from him (T. 1215-1216).

Bartolucci said the payments were voluntary but he felt he wouldn't get the work if he didn't pay (T. 1187). It was a practice that just continued (T. 1216), a way of life (T. 1186). Only the lowest bidder would get the contract (T. 1241). He assumed the payments were a favor to get

future business (T. 1187, 1246). Lugosch never demanded money from him (T. 1204).

Sitterle never thought about what would happen if he didn't pay the money (T. 1132).

Lugosch never told Pascale he would receive no business from the Board if payments were not made (T. 1379). Pascale thought he might not receive any business but it was a way of doing business (T. 1379-1382). Lugosch never made any promises for future work if the rebates were given (T. 1383). Lugosch never requested Pascale to pay any money (T. 1379-1390) and Pascale knew when he was the lowest bidder he received the bid (T. 1377).

Siegel said his payments were voluntary (T. 711), there was no force or threats. He gave the money out of his pocket because he assumed he might lose business if he did not give (T. 711). His father had never told him there were any threats or fears (T. 719) and the payments were characterized as acts *of good will to maintain business* (T. 719). (emphasis added) The money was paid more as a matter of habit (T. 729) and no one ever suggested to his father that the firm would lose business if the money was not paid (T. 741).

Rassner believed that the lowest bidder received the award (T. 983) and Lugosch never extorted any money from him through fear or sent anybody around to collect money (T. 980). He made the payments because of the policy he believed prevailed at the time (T. 954).

These examples and the evidence show the very antithesis of extortion, fear, playing on fear or causing another to fear any "power" Lugosch might have had. The evidence shows Lugosch never played on anyone's

fear since the contractors were aware that the lowest bidder always got the contract and it was Lugosch, himself, that stated that the only way for this procedure to stop was for the contractors to get together and stop it (T. 1199, 1495-1496).

Lugosch (T. 3099) joined in other arguments (T. 3068), urging the Court that the rule of *Johnson v. United States*, 158 F. 69 (5th Cir., 1907) applied, for on the Government's evidence, since there was no fear, the alleged victimes were actually co-conspirators since they participated in the alleged scheme. The contractors went along with the scheme; in essence, they were bargaining for improper influence. *United States v. Kubacki*, 237 F. Supp. 638 (D.C. Pa., 1965).

IX. HAS THE COURT OF APPEALS, IN ITS JUDGMENT IN THIS CAUSE, WITHOUT OPINION, EFFECTIVELY PREVENTED THE SUPREME COURT OF THE UNITED STATES FROM DETERMINING WHETHER THIS CASE, WITH SUBSTANTIAL FEDERAL QUESTIONS, PRESENTS THOSE QUESTIONS IN SUCH A MANNER THAT THEY ARE WORTHY OF REVIEW.

The purpose of the requirement that findings be made by a trial court is (1) to enable the appellate court to determine the grounds upon which the lower court reached its decision; (2) to enable the defeated party to determine whether the case presents a question worthy of consideration by an appellate court; and (3) to spare an appellate court the necessity of searching the record in order to supply findings of fact. See: *Virginia Railroad Co. v. United States*, 272 U.S. 658, 675 (1926); *Michener v. United States*, 177 F.2d 422 (8th Cir., 1949). An additional

purpose, especially in criminal cases, is to insure that each case is carefully considered and each argument is carefully weighed.

Logically, to permit a court to render a judgment without an opinion might well invite wholesale abandonment, in the future, of the common law system since our legal concepts expand only with the constant and additional input of new ideas and approaches. Likewise, future courts, which may not be as diligent as presently, might use the avenue of rendering a judgment without an opinion as a means of evading complex and lengthy cases. While such approach might greatly expedite the caseload of our already overburdened judiciary, surely such would not be in the best interests of protecting individual liberty and safeguarding due process of law.

In *Baltimore & Ohio Railroad Co. v. United States*, 279 U.S. 781, 787 (1928), an equity case, the Court stated:

> "The lower court entered its decree dismissing the suit and, after reversal here, denied restitution without opinion, statement of reasons or citation of authority. The questions were important, and the amounts involved were large. The judges should have given their reasons on which they rested their decisions. . . ."

Had an opinion been rendered, the Petitioner and this Court would have been secure with the knowledge that each point was carefully considered; without an opinion neither the Petitioner, Joseph Lugosch, nor this Court, nor, indeed, the American legal system, has the knowledge that Petitioner was afforded the due process of our legal system which each of us is guaranteed, especially when, Petitioner contends, his points are meritorious and

he was entitled to a reversal in the Third (3rd) Circuit Court of Appeals.

CONCLUSION

For the aforesaid reasons, this Court should grant the Writ and render such decision as is just.

Respectfully submitted,

KARL G. FEISSNER
Attorney for Petitioner

Of Counsel:

FEISSNER, KAPLAN, SMITH,
JOSEPH & GREENWALD
6401 New Hampshire Avenue
Hyattsville, Maryland 20783
301-270-2626

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1734

UNITED STATES OF AMERICA

vs.

PATRICK MUSTO, *et al.*,

JOSEPH D. LUGOSCH, *Appellant*

(D.C. Criminal No. 260-71)

Appeal from the United States District Court
for the District of New Jersey.

Argued December 12, 1972

Before: SEITZ, *Chief Judge*, and LADISERT and ROSENN, *Circuit Judges*.

ORDER

After consideration of the contentions raised by appellant that (1) the indictment did not set forth reasonable particularities; (2) the court erred in admitting into evidence a confession of appellant; (3) appellant's motion for judgment of acquittal should have been granted; (4) the court placed an unreasonable time limitation on

defense counsel's closing argument; (5) the trial court erred in its charges to the jury; and (6) the trial court erred in permitting the testimony of witness Siegal regarding alleged fear;

IT IS ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT.

/s/ Aldisert
Circuit Judge

DATED: Dec 13, 1972

APPENDIX B

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
For the Third Circuit

THOMAS F. QUINN
CLERK

2046 U. S. Courthouse
Ninth & Chestnut Streets
PHILADELPHIA 19107

TELEPHONE
215-597-2995

December 13, 1972

Karl G. Feissner, Esquire
Feissner, Kaplan, Smith & Joseph
6401 New Hampshire Avenue
Hyattsville, Maryland 20783

John J. Barry, Esquire
Assistant U.S. Attorney
Federal Building
Newark, New Jersey 07102

Re: U.S.A. vs. Patrick Musto, et al. Joseph D. Lugosch, Appellant No. 72-1734

Gentlemen:

Enclosed herewith is conformed copy of order entered by the Court today in the above-entitled case.

Very truly yours,

/s/ _____
Clerk

Enclosure

bjr

cc: Richard Levin, Esquire
Richard F. Simeone, Esquire

EXCERPTS
A

OPENING STATEM
Mr. Richardson: (U

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(Emphasis supplied)

APPENDIX "C"

EXCERPTS OF TESTIMONY, FINDINGS AND INSTRUCTIONS

OPENING STATEMENT: (T. 212)
Mr. Richardson: (U.S. Attorney)

* * *

His office was right across the street from the Board of Education office and he went there. They went there. Joe, here is the bill. This is what it is going to cost. The testimony will show, ladies and gentlemen, that Joe Lugosch would look at that bill and he would assess a figure on it. The figure generally ran 5 to 10 percent of what that bill was. The testimony will show, ladies and gentlemen, that there were times when Joe Lugosch told his contractors that I'm collecting for the boys, for the boys. We will prove to you beyond a reasonable doubt that the boys were the members of the Board of Education. The contractor would go back to his business. *He would redo the bill*, tear up the old sheet. It wasn't necessary any more. This was a way of life in Union City. *He would then submit his newly-inflated bill with the kickback price to the Board of Education.* Ultimately he would be paid and then he would make a second trip to the office of Joseph Lugosch and he would pay his money. He would pay his dues because he was a member of the club. If he didn't pay his dues, he wouldn't get the business. (Emphasis supplied)

* * *

(T. 711)

EXCERPTS OF TESTIMONY IN OPEN COURT

The Question of Fear or Extortion

Mr. Richardson:

Q: Sir, with respect to these payments that you made to Mr. Fenton, were they voluntary or involuntary on your part?

Mr. Seigel:

A: On my part they were voluntary.

Q: Would you explain what you mean by voluntary?
A: There was no force or anything. I gave it to him out of my own pocket.

Q: When you say force, what do you mean, sir?
A: Well, nobody ever threatened me that I would lose any business or anything. I assumed it myself, but I just followed in a path that had been going on prior to my father's death.

Q: Did you ever receive any direct threats from any one of the defendants or anyone associated with the Board of Education, sir?
A: No, never.

* * *

(T. 719)

BY MR. SIMEONE: (Defense Counsel)

Q: Your father didn't state to you that he was in any fear?

MR. SIEGEL:
A: Definitely not.

Q: And he did this voluntarily, to your knowledge?
A: He didn't state that, either, but I know my father wasn't in any fear.

BY MR. FEISSNER: (Defense Counsel)

Q: It is characterized by you as an act of good will on your part to maintain the business?
A: It could be characterized as that.

* * *

(T. 722)

THE COURT: Did your father have such a fear that was communicated to you?

MR. SIEGEL: At the time my father was running the business, it was a major part of the corporation – today it is not, but at that particular time it was – it would have been a substantial loss.

THE COURT: When you said that your father was not subjected to any fear, what type of fear were you speaking about?

THE WITNESS: Loss of business.

THE COURT: And he was not subjected to the fear of losing business, he didn't think he was going to lose business?

THE WITNESS: No, he thought he was going to lose it, but there was no pressure or anything ever put on him.

THE COURT: When you say "pressure" what are you speaking of?

THE WITNESS: Well, like the man came in and said, "Well, if you don't give it to me you are not going to get the order anymore," that's what I am referring to.

THE COURT: Do you know whether or not that ever happened?

THE WITNESS: No, that I don't know.

THE COURT: You don't know that? (T. 723)

THE WITNESS: No, I don't.

THE COURT: But your father, at least so far as you know from what you told us, made these payments and communicated to you that he made these payments in order to hold on to the Board of Education business; is that right?

THE WITNESS: That's right.

THE COURT: Did your father ever say anything to you with respect to whether or not he wanted to make these payments, or whether if he had the option he would not make the payments?

THE WITNESS: No.

THE COURT: Anything further, counsel?

EXAMINATION OF VOIR DIRE
BY MR. FEISSNER: (Defense Counsel)

Q: As far as you understood your father making these payments, he made them because he wanted to keep the business, is that right?
A: Yes.

Q: They were voluntary, as far as you knew, is that right?
A: As far as I know, yes.

MR. FEISSNER: Thank you.

* * *

(T. 729)

THE COURT: When you stated that you paid the 10 percent voluntarily, what did you mean in that connection?

MR. SIEGEL: I might have used the wrong word.

THE COURT: What did you mean, whatever word you used; what did you mean by it?

THE WITNESS: I gave it without – voluntarily, I gave it to him when he came in.

THE COURT: Because you wanted to keep the business?

THE WITNESS: Right. He didn't ask for it when he came in. I voluntarily gave it to him.

THE COURT: And when the term "good will" was used, and you stated that you paid the 10 percent, I think, roughly characterizing it as a matter of good will, what did you mean by that?

THE WITNESS: How did I say that?

THE COURT: Did you in fact pay the 10 percent as a matter of good will?

THE WITNESS: No, not as good will as such. A matter of, I guess, habit.

THE COURT: What was the purpose of your paying the 10 percent?

THE WITNESS: To maintain the business.

* * *

BY MR. FEISSNER: (T. 741)

Q: No one had told your dad that he was going to lose business?
A: Not to the best of my knowledge.

Q: And no one told you that you were going to lose business?
A: No.

Q: So then to return, your purpose in making these payments was to insure yourself that in the future you would continue to get the business from the Board of Education?
A: Yes.

Q: And you came upon this conclusion that by paying ten percent, or whatever percentage, that it would be a good way of insuring that you would get the money in the future? Is that right?

* * *

A: Yes. (T. 741)

Q: And this conclusion that you came to in your own mind was not motivated by any person or any act of any member of the Board of Education of Union City, is that correct?
A: Yes, sir.

* * *

BY MR. RICHARDSON: (T. 747)

WITNESS SITTERLE

Q: What part of your business did that 10 percent come from, if any?

MR. SITTERLE:
A: What part of my business?

Q: Yes.
A: I don't understand what you mean. It came from the checks. When we got them in I would take 10 percent from my safe deposit box or my own bank account.

Q: What was your mark-up again, sir?
A: Around 30 overall.

Q: 30 percent?
A: Right.

Q: Where did the 30 percent come from with respect to the moneys (sic) that you received from the Board of Education?
A: That came from my own personal funds.

* * *

BY MR. RICHARDSON: (T. 1108)

Q: And could you explain the procedure by which you did work for the Board of Education?

MR. SITTERLE:
A: Well, Mr. Lugosch would call me up and tell me there would be a problem in one of the schools, to go down and take care of it. So I would go down, take care of the problem and later on I would go to Mr. Lugosch and tell him what the problem was, give him the bill for work that was done.

Q: What, if anything, would Mr. Lugosch do on those occasions?
A: On those occasions it would be a yellow piece of paper with the time and material and Mr. Lugosch would put a figure on the sheet for the boys.

Q: How much was that figure, sir?
A: Between five and ten percent.

Q: What, if anything, would you do after that figure was put on the sheet?
A: Well, I would take the sheets home and revise my time and material.

Q: And after that what would you do, sir?
A: I would submit it back to Mr. Lugosch.

Q: What would you submit back to Mr. Lugosch?
A: The voucher. (T. 1109)

Q: What would you do with that yellow sheet of paper, sir? If anything.
A: I would hold on to that piece of paper and until I was paid for the job. When I was paid, then, and if I could accumulate money, then I would give it to Mr. Lugosch and then I tore up the sheet of paper.

Q: How soon after you submitted this bill to Mr. Lugosch would you receive payment?
A: Well, it all depends when the Board meeting was. Sometimes it would be within a month. Sometimes it would be within two months.

THE COURT: Mr. Sitterle, when you said you took this yellow sheet of paper back and you would revise your time and material, what did you mean by that?

THE WINTESS: Well, with the figure that Mr. Lugosch would put on the paper.

THE COURT: You mean you would prepare another piece of paper that was different than the first piece of paper?

THE WITNESS: With the figure that Mr. Lugosch put on the piece of paper.

MR. BROOKS: May I clarify this, your Honor?

Q: Mr. Sitterle, would you explain for the Court and jury how the second piece of paper differed from the first piece of paper? (T. 1110)
A: Well, there was a certain figure that Mr. Lugosch would add on for the boys, and then I would have to revise my labor and my material to correspond with that figure.

Q: Would raise the price of your labor and material, sir?
A: Yes.

Q: Where was this done? Where did these conversations with Mr. Lugosch take place?
A: In his office.

Q: Where in his office, sir?
A: 36th Street, Union City.

Q: What was the procedure, if anything, after you received the check from the Board of Education?
A: Well, Mr. Lugosch would call me up and tell me that he has a check for me and I could pick it up at his office. I would go up and pick the check up.

Q: Did you give anything to Mr. Lugosch on those occasions?
A: Sometimes and sometimes not.

Q: When you mean sometimes what, if anything, did you give him?
A: I gave him cash.

* * *

BY MR. FREIMAN: (T. 1127)

Q: You don't remember, but at any rate is that your signature on the back?

MR. SITTERLE:

A: Yes, sir.

Q: Now I want you to read the certificate there with me. Did you certify and solemnly declare and certify under the penalties under the law that the within bill is correct in all particulars? Did you do that?

A: I never read that.

Q: You never read it?

A: No, sir.

Q: Did you know when you submitted that bill that you have before you, that you were over-charging the Board of Education?

A: Yes.

* * *

BY MR. FREIMAN: (T. 1132)

Q: Were you then asked this question:

"In terms of your business what did you think would happen if you refused to kick back when asked to do so during this time period that we have been talking about?"

Were you asked that question?

MR. SITTERLE:

A: Yes.

Q: And did you answer, "Well, I actually never thought about what would happen if I didn't do it."

A: Yes, sir.

Q: And is that your answer?

A: Yes, sir.

Q: And was that the truth?

A: Yes, sir.

* * *

WITNESS BARTOLUCCI (T. 1187)

BY MR. RICHARDSON:

Q: Answer it the best you can with an explanation.

MR. BARTOLUCCI:
A: I would say it was done voluntarily. No one threatened me. No one threatened my life that if I didn't pay I'd get hurt, bodily harm. But I felt that if I didn't pay I probably wouldn't get the work.

* * *

BY MR. FEISSNER: (T. 1240)

Q: And thereafter, sir, you did make the payments? You made these from your own pocket, is that correct? That is, you would draw a salary check and set some money aside, is that correct?

MR. BARTOLUCCI:
A: Yes, sir, right.

* * *

MR. FEISSNER: (T. 1246)

Q: Now, these payments that you made, were they as a favor because of past business?

MR. BARTOLUCCI:
A: No, I don't believe they were.

Q: Were they as a favor to get future business?
A: I would assume that's what it was.

Q: You would assume that's what it was?
A: Yes.
Q: You were also informed, as I understood you to say, sir, that on one occasion when the subject was broached

you were told the way to stop this is for you fellows to stop it, is that right, sir?
A: Yes.

Q: And when that subject was broached to you that is the way for this to be stopped, was for you to stop it, did you then stop it?
A: No, sir.

Q: The payments that you made, sir, that you have referred to in answer to other questions, were these also to include for the purposes of political contributions?
A: Yes.

• • •

WITNESS PASCALE (T. 1379)

BY MR. SIMEONE:

Q: With reference to Mr. Lugosch, did he ever force you to make these payments?

MR. PASCALE:
A: No, he never – you know – told me I had to get them in, no.

Q: Isn't it a fact than he stated to you upon occasion that you didn't have to do this, and it would be advisable to cut these payments out?
A: He never said in front of me – I don't remember him saying this.

Q: Did he ever state to you words to that effect, that if you don't pay you're not going to get this work?
A: Will you please repeat that again?

Q: If you don't pay you're not going to get this work
A: Mr. Lugosch saying this to me?

Q: Yes.
A: No, he never said that.

Q: Did you ever have any conversations with him concerning your payments, your alleged payments, that you didn't want to make them? (T. 1380)
A: I don't remember, but I could have said it, you know. The contractors were going to try to stop it, or something, you know. I don't remember it.

Q: You made these payments voluntarily, am I correct in saying that?
A: When you say "voluntarily", the only way I can answer you is if I didn't give him the check or – not the check, but the cash, I could never have gotten work after that, I don't think so, anyway.

Q: You don't think, but did he ever say "You won't get any work"?
A: No.

* * *

BY MR. SIMEONE: (T. 1381)

Q: Isn't it a fact that getting back to these payments, with reference to these payments, that Mr. Lugosch didn't demand it of you, he just asked you if you wanted to you could?

MR. PASCALE:
A: He never put them in that words, you know, if you want to. I don't remember him ever saying that. I will say he never twisted my arm and said "You will have to give it."

Q: Did he ever use words to you, like, if you could bear it?
A: I don't remember that.

Q: Do you recall testifying before the Grand Jury, the Federal Grand Jury, at Page 39, Line 9 –

MR. SIMEONE: What was the date on that?

MR. RICHARDSON: February 10th.

Q: Do you recall being asked: "At some time after Mr. Melanka died in the course of your work for the Union City Board of Education did Lugosch tell you that you should add on some amount to your requisition for the boys, and did he give you the figure to be added on?"
Do you recall Mr. Heifetz asking you that question?
A: No, sir. (T. 1382)

Q: Do you recall this answer: "Yes, I was told to add if it could bear it five to ten percent"?
A: No, sir.

Q: You don't remember being asked the question and giving the answer?
A: No, sir.

* * *

BY MR. SIMEONE: (T. 1382)

Q: With reference – you stated that he never twisted your arm. How did these payments come about? Was it merely a suggestion on his part?

MR. PASCALE:
A: I don't remember how it started or who – you know -

Q: You stated that it got to be just, I believe – you used the words "a way of business"?
A: Right.

* * *

BY MR. SIMEONE: (T. 1382)

Q: What was to be the determining factor if you were going to give five or ten percent?

MR. PASCALE:
A: I figured later on I would get more work.

* * *

WITNESS ANTINORI

BY MR. FREIMAN: (T. 1465)

Q: Mr. Antinori, is it your belief that all bids awarded by the City of Union City were awarded to the lowest bidder?

MR. ANTINORI:
A: Yes, sir.

* * *

BY MR. LEVIN: (T. 1499)

Q: With respect to the payments that you have testified to, would the billings which would be submitted to the Union City Board of Education be increased by Antinori Brothers to the extent of the kickbacks which you had to make? (T. 1500)

MR. ANTINORI:
A: Yes, sir.

Q: Plus an amount to cover your taxes?
A: Yes, sir.

Q: And that would be so on each occasion on which you made kickbacks, would it not?
A: Yes, sir.

Q: Do I understand, then, that Antinori Brothers really suffered no financial loss with respect to the kickbacks which were actually made?
A: No, no.

MR. LEVIN: Thank you.

* * *

THE CONFESSION

(The following testimony was taken out of the presence of the jury.) (T. 1574)

AGENT PINO

BY MR. SIMEONE:

Q: To your knowledge, then, no one in there, Mr. Heifetz or Mr. Vaccarino, informed him of his rights, nor did he sign an advice of rights?

AGENT PINO:

A: He did not sign one. As I say, we did not make a record of the interview. I cannot recall whether Mr. Heifetz may have verbally advised him of his rights or not. I don't recall that. I didn't, and to my recollection Mr. Vaccarino didn't.

Q: How long did that interview take?

A: I would estimate approximately an hour, but that's certainly just an approximation.

Q: You took no notes:

A: There was no need to. It was off the record.

* * *

BY MR. SIMEONE: (T. 1576)

Q: And then you went back again on December 9th and just went through all of this material again?

AGENT PINO:

A: Well, at that time we had other questions that we asked and were brought out.

Q: What were they?
A: Certainly the possibility of the convention. I don't recall it being a part of the first interview. That was, I think, brought out when we were trying to find out where the money went from Dr. Castorino. He maintained that he didn't know. He had no idea where it went. But after questioning him he said that it was logical to assume that it went to other members of the Board.

We asked him why would he make that assumption.

He said that, well, at one point this convention was brought out where other members of the Board were there and questioned him about where the money was. He told them it had already been turned over to Chappi Galasso.

Q: You do remember on the second -- you remember that specifically on the second interview in December he mentioned something about a convention?
A: Yes. That is made part of the record, there.

(T. 1577)

Q: Do you recall him talking – speaking to you anything about Antinori Brothers?
A: Yes.

Q: When was this?
A: On both occasions.

Q: And was it substantially the same, the first occasion and the second occasion what he told you about Antinori Brothers doing a job down at the playground for the City?
A: Yes. Basically the story was the same that he received kickbacks from them and how they originally approached him, or one of the Antinori Brothers had approached him.

Q: And do you recall him talking about Dr. Spano?
A: Yes.

Q: And when did that take place?
A: On both occasions.

Q: And likewise with the involvement of Chappi Galasso?
A: Yes, sir.

Q: That happened on both occasions?
A: Yes.

Q: The November and December interviews?
A: Yes.

* * *

BY MR. SIMEONE: (T. 1580)

Q: What about the part of the conversation about receiving kickbacks on Union Hill, Robert Waters and Edison School, when was that, and turning it over to Dr. Spano, Galasso and Castorino.

AGENT PINO:
A: That was the second interview, because at the time of the first interview we had not gone into the details of the contractors. So that was all a part of the second interview.

* * * (T. 1583)

BY MR. SIMEONE:

Q: Did Mr. Lugosch mention to you about Mr. Bartolucci?

AGENT PINO:
A: Yes, the Bartolucci name did come up.

Q: When, the first time or second time?
A: Both occasions.

Q: And Mr. Sitterle?
A: Mr. Sitterle also.

Q: On both occasions?
A: Both occasions.

Q: And Pascale on both occasions?
A: That's correct.

* * * (T. 1587)

EXAMINATION CONTINUED BY THE COURT:

Q: Agent, with respect to Exhibit 874 for identification, you just testified that the material that is contained in 874 was a combination of material that you had learned at the first interview and at the second interview, is that correct, sir?

AGENT PINO:
A: We asked the same questions at both interviews.

Q: You asked the same questions at both interviews?
A: Right.

Q: So, to the extent that those questions and answers there are reflected in the 302 Form, is that it?
A: Yes.

Q: In your 302, to that extent there is a combination, as you put it, of that information, is that correct?
A: That is right. (T. 1588)

Q: And Agent, without that first interview, would you have been in a position to ask the same or similar questions at the second interview?
A: Yes, because we had basic information.

Q: You mean from other than Mr. Lugosch?
A: Yes.

* * *

BY THE COURT: (T. 1589)

Q: At the first interview, all right.

AGENT PINO:
A: We knew that and Antinori had handled other contracts and maintenance jobs for the Board of Education, and the fact that the maintenance job was close to $2,000, and no kickback was made.

Q: You know that from Antinori or Lugosch?
A: From Antinori. We did not know from prior to talking to Mr. Lugosch the first time about who the payments were made to, Dr. Spano, Chappi Galasso or Castorino. We did not know the chain –

Q: Of payments?
A: Right.

Q: So you had that information in mind or at least you were aware of it at the time that you interviewed Mr. Lugosch again at his office on December 9th, is that correct, sir?
A: Right.

* * *

CROSS-EXAMINATION BY MR. SIMEONE: (T. 1609)

Q: Mr. Vaccarino, were you present in Mr. Heifetz' office sometime prior to the December 9 interview?

AGENT VACCARINO:
A: Yes, I was.

Q: Who else was there?
A: Mr. Heifetz and Mr. Pino.

Q: And would you describe the circumstances of that particular meeting? Do you know how Mr. Lugosch arrived there? (T. 1610)

A: Mr. Lugosch was called up by Mr. Heifetz to come to the office and to discuss certain things regarding the Union City Board of Education off the record.

Q: Off the record?
A: Right.

Q: And as a result of the off-the-record conversations which took place on that date, were many of the conversations – much of the conversation of the earlier meeting mentioned on the December 9th meeting with Mr. Lugosch?
A: I can't recall any specifics. The only thing I recall is that the meeting didn't take very long, no notes were taken.

Q: You didn't take any notes?
A: Not at that meeting.

Q: Mr. Heifetz didn't take any notes?
A: Not at that meeting.

Q: Mr. Heifetz didn't take any notes?
A: I don't recall whether he did or not.

Q: You didn't keep any time log?
A: No.

Q: As you normally do?
A: Normally in what respect, sir?

Q: Don't you always keep a time log when you interview a witness? (T. 1611)

MR. BROOKS: Objection, the same gound that counsel made the objection to my question.

THE COURT: This is cross-examination, I will permit it.

THE WITNESS: Would you restate the question, please?

Q: Don't you always keep a time log when you interview a witness?
A: It depends. If we advise them of their rights, we always keep an interview log.

Q: So you didn't advise him of his rights on that date on the earlier interview?
A: This is Mr. Heifetz's [sic] interview.

THE COURT: Did you advise him of his rights, sir?

THE WITNESS: No, I did not.

THE COURT: Do you recall whether or not Mr. Heifetz did?

THE WITNESS: I do not recall.

THE COURT: He could or could not have, is that your testimony?

THE WITNESS: He could have verbally.

THE COURT: But you don't recall?

THE WITNESS: I don't recall.

* * *

THE COURT: (T. 1694)

I further find as a fact that no warnings were given at that time and it is my view that the defendant Lugosch at that time was told that there was some implication with respect to him in an investigation that was being

conducted with regard to the Union City Board of Education. I have some difficulty in accepting the testimony of Mr. Lugosch as being completely credible in at least some particulars, but for the purposes at least of this decision I will accept his statement that he was told if he did not cooperate he might or would be a target, because I feel it doesn't add anything to the posture of the matters as they presently are before me, and I say that because I feel that there was a sufficient difference in the nature, time and circumstances surrounding the December 9th interrogation so as to preclude any continuing effect of any statements . . . .

* * *

(The following testimony was taken in the presence of the jury.)

AGENT PINO (T. 1744)

BY MR. SIMEONE:

Q: And do you know offhand if Mr. Lugosch was told by Mr. Heifetz that he would not be hurt in any way if he would cooperate with your department — with the Government?

AGENT PINO:
A: He was not told that exactly to my knowledge, sir.

Q: What was he told?
A: As I recall it, he was told that if he cooperated fully that the Government had the option of not prosecuting him.

Q: They had the option of not prosecuting him?
A: Yes, sir.

Q: And was Mr. Vaccarino present when that was said?
A: Yes.

* * *

INSTRUCTIONS BY THE COURT: (T. 3702-3703)

This case, as most cases do, involves a question of fact. A basic question for you to determine is whether the Government's witnesses are telling the truth or whether the defendants and their witnesses are telling the truth. This is a problem peculiarly yours for solution, and it is suggested to you that you utilize not only the standards of judgment outlined to you by the Court, but many which will stand the test of your own reason and logical reaction to experience. In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, intelligence, attitude and behavior of the particular witness, the interest of the witness in the outcome of the case, the motive and the state of mind of the witness, the relation of the witness to the Government or to any of the defendants, the inclination of a witness to speak truthfully, whether or not a witness was an accomplice, whether or not a witness received immunity or the probability or improbability of the witness' statements and all other facts and circumstances in evidence.

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-941

JOSEPH LUGOSCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals affirming the judgment of conviction (Pet. App. A) was entered without opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1972. The petition for a writ of certiorari was filed December 29, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment identified the victims of the extortion scheme and the dates on which the offenses were committed with sufficient particularity.

2. Whether petitioner's confession was the product of improper government inducements.

3. Whether the alleged kickbacks involved here affected interstate commerce within the meaning of the Hobbs Act.

4. Whether the trial court abused its discretion in limiting the time of summation by petitioner's counsel to one hour.

5. Whether the trial judge properly instructed the jury on the elements of the offense and the manner in which to weigh the evidence.

6. Whether the evidence at the trial showed that the money had been taken from the victims as a result of fear or threats induced by the co-conspirators.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of conspiring to extort and on four substantive counts of extortion in violation of the Hobbs Act, 18 U.S.C. 1951.[1] He was sentenced to two and one-half years' imprisonment and fined $8,000 on the conspiracy count; on each of the other counts, he was sentenced to concurrent terms of two years' probation, commencing upon his release from prison, and was fined $3,000. The court of appeals affirmed without opinion (Pet. App. A).

The evidence at trial showed that petitioner, an architect for the Union County Board of Education for 10 years prior to 1972, and the members of the Board used

[1]Co-defendant Musto was also convicted at the same trial; his conviction was affirmed by the court below and he has also filed a petition for a writ of certiorari, No. 72-946.

their positions to impose a system whereby businessmen could do business with the Board only if they paid kickbacks. The testimony of three unindicted conspirators—Savarine, Fenton, and Castorino—disclosed that a group of businessmen, whom the conspirators referred to as "the club", kicked back approximately ten per cent of the money they received from their sales to the Board; the funds so collected were distributed to petitioner and to members of the Board. Representatives of thirteen firms that did business with the Board further testified that they paid the kickbacks because payment was a requirement of doing business. One of the witnesses characterized the system of official corruption as being so pervasive that it was "a way of life" (VI Tr. 1186).

ARGUMENT

1. Petitioner asserts that the indictment in this case fails to identify the victims and dates of the alleged offenses with sufficient specificity. But counts I through V, on which petitioner was found guilty (Pet. 6), include the names of firms which were victims of alleged extortionate threats and state that the alleged offenses occurred between April 1966 and December 1970. Thus the indictment apprised petitioner with sufficient particularity of the offenses for which he was being charged to protect him against double jeopardy. See, *e.g.*, *United States* v. *Kenny*, 462 F.2d 1205 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States, et al.*, Nos. 72-118, -119, -120, -121, -128, October 16, 1972; *United States* v. *Addonizio*, 451 F.2d 49 (C.A. 3), certiorari denied, 405 U.S. 936. Moreover, petitioner and his co-defendants were furnished a detailed bill of particulars containing a complete schedule of the approximate dates of the offenses and what payments were made; his claim of prejudice based on an alleged deficiency in the indictment is therefore not well

taken. See *United States* v. *De Cavalcante*, 440 F.2d 1264, 1269 (C.A. 3).

2. Petitioner next argues that his confession was the product of false government promises, and thus should not have been admitted into evidence. Petitioner was interviewed twice about kickbacks on work done for the Board.

On the first occasion, he was interviewed in the office of the Assistant United States Attorney in the presence of two F.B.I. agents (VII Tr. 1610, 1622); no notes were made of the interview (VIII Tr. 1571). Petitioner was confronted with information which implicated him in the extortion scheme (VII Tr. 1594), and was told that if he cooperated fully, the government had the option of not prosecuting (VII Tr. 1744). At trial the government did not introduce, or even attempt to introduce, anything said by petitioner during this interview.

The second interview was conducted by the F.B.I. agents at petitioner's office on December 9, 1970 (VII Tr. 1602).[2] Prior to conducting this interview, petitioner was advised fully of his *Miranda* rights and was given a waiver-of-rights form, which he read and signed (VII Tr. 1601-1603). He was then again confronted with information implicating him and he made a statement (VII Tr. 1693-1699); it is the admission of this statement that he challenges.

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[2]According to petitioner's testimony at trial the first interview had occurred some five or six weeks earlier, in October (VII Tr. 1622). One of the F.B.I. agents testified that the period between interviews was from one to three weeks (VII Tr. 1572).

Petitioner argues that the first interview was not voluntary because it was improperly induced by the statement that the government had the option of not prosecuting him; the second interview weeks later, he asserts, even though preceded by *Miranda* warnings, was the product of the first. The trial court, however, correctly determined that it was not necessary to rule on the voluntariness of the first statement, since, even if petitioner felt he was being offered immunity at the first interview, there was a sufficient difference in the nature, time, and circumstances surrounding the second interview to preclude the continuing effect of the first (VII Tr. 1694-1695). Any illegality in the first interview had dissipated. *Wong Sun* v. *United States*, 371 U.S. 471. In addition, since the second interview was prefaced by complete *Miranda* warnings and petitioner's execution of a waiver-of-rights form, petitioner was on notice when he made the incriminating statements that anything he said could be used against him. *United States* v. *Shea*, 436 F.2d 740 (C.A. 9).

3. Petitioner also contends for the first time that the government failed to establish that the kickbacks he allegedly received affected interstate commerce. But each of the substantive counts which served as the basis for petitioner's conviction involved firms engaged in construction for the Board of Education. These firms used materials moving in interstate commerce (IV Tr. 673, 768-769; V Tr. 945; VI Tr. 1104, 1159, 1313, 1339; VII Tr. 1392; XII Tr. 3713). The extortion of tribute from contractors engaged in local construction work who are dependent upon interstate commerce for materials is covered by 18 U.S.C. 1951. *Anderson* v. *United States*, 262 F.2d 764 (C.A. 8), certiorari denied, 360 U.S. 929; *Hulahan* v. *United States*, 214 F.2d 441 (C.A. 8), certiorari denied, 348 U.S. 856; see also *United States* v. *DeMasi*, 445 F.2d

251 (C.A. 2); *United States* v. *Kramer*, 355 F.2d 891 (C.A. 7), reversed on other grounds, 384 U.S. 100.

4. Petitioner objects to the court's one hour limitation on the summation to the jury by his counsel.[3] The trial judge, however, has wide discretion in limiting the time for argument to the jury. *United States* v. *Roviaro*, 379 F.2d 911 (C.A. 7); *Barnard* v. *United States*, 342 F.2d 309 (C.A. 9), certiorari denied, 382 U.S. 948; *Hodge* v. *United States*, 271 F.2d 52 (C.A. 5), certiorari denied, 361 U.S. 961; *United States* v. *Kay*, 101 F.2d 270 (C.A.2), certiorari denied, 306 U.S. 660. And a limitation granting each defendant in a multi-defendant case one hour to summarize is clearly a reasonable exercise of discretion. See *United States* v. *Gleeson*, 411 F.2d 1091 (C.A. 10), restricting several defendants to one hour jointly for closing arguments.

5. Petitioner also takes issue with certain aspects of the court's instructions to the jury.

a. He challenges the court's statement that "[a] basic question for you [the jury] to determine is whether the Government's witnesses are telling the truth or the defendants and their witnesses are telling the truth" (XII Tr. 3702-3703). This instruction, he argues, placed the burden on him to acquit himself and incorrectly required the jury to consider as truthful all the evidence on either side rather than allowing it to render a judgment on the evidence considered as a whole. But the quoted statement should not be read in isolation. The trial judge also specifically instructed the jury that the government had the burden of proving guilt beyond a reasonable doubt (XII Tr.

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[3]The government was granted one hour and forty-five minutes; each of the three defendants was granted one hour (XI Tr. 3319).

3710, 3722). He instructed them that they were to consider all the evidence that had been produced (XII Tr. 3708), to consider the case of each defendant from the evidence as to each count which may be applicable to him (XII Tr. 3706), and to consider all the instructions as a whole (XII Tr. 3702). When the challenged instruction is read in its proper context, the jury could not have been misled into believing that it had to credit only the evidence of one side or that the burden of proof was on the defendants. Moreover, the jury's conviction of petitioner and a co-defendant, while at the same time acquitting a third defendant, indicates it considered fully the evidence submitted by both sides.

b. The trial court refused to give an instruction as to whether there was more than one conspiracy. In so doing, the judge explained that since the alleged purpose of the conspiracy was to extort money from contractors and vendors at the bottom for the benefit of petitioner and Board members at the top, the mere fact that there might be several roads leading from the bottom to the top, did not make each of them a separate conspiracy (XII Tr. 3587-3588). Here the conspiracy was an agreement by the Board and petitioner to extort funds from individuals doing business with the Board. Unlike *Kotteakos* v. *United States*, 328 U.S. 750, where separate conspiracies were only connected by the participation of a single individual in all of them, the agreement here itself established a general scheme designed to encompass all of the sales charged in the indictment. See *Blumenthal* v. *United States*, 332 U.S. 539. As in *United States* v. *Kenny*, 462 F. 2d 1205 (C.A.3), certiorari denied *sub nom. Kropke* v. *United States, et al.*, Nos. 72-118, -119, -120, -121, -128, October 16, 1972, where the court determined that only one conspiracy existed, it is clear here that

none of the so-called subsidiary conspiracies would have operated except for the existence of the overall conspiracy charged in the indictment. Accordingly, the court properly declined to give the requested instruction.

c. Petitioner finally contends that if the payments were merely made to bribe the Board, there can be no extortion, and therefore the trial court erred in refusing to charge the jury as to the law of bribery. The testimony of the victims does not support the view of the petitioner that the payments were bribes or payments for preferential treatment; but even assuming there was a question about the intention generating the kickbacks, the court's charge completely covered this area. The court emphasized that the mere fact that payments were made was not alone sufficient to support a conviction; it advised that the jury would have to find in addition the payments were made under a fear of economic loss (XII Tr. 3735). Therefore, as the court stated in *United States* v. *Addonizio*, 451 F. 2d 49, 77 (C.A. 3), certiorari denied, 405 U.S. 936, since the court "adequately set forth the characteristics distinguishing bribery from extortion, [t]here was no need to instruct in detail as to an offense for which the defendants were not on trial. * * *"

6. Petitioner makes the additional contention that the evidence at trial failed to show that the money was taken as a result of fear or threats induced by the alleged conspirators. But some of the representatives of firms making the payments testifed that the kickbacks were understood as prerequisities for doing business with the Board (IV Tr. 684, 747,759; V Tr. 875-884, 954-956, 1019-1022; VI Tr. 1096-1098; VII Tr. 1358-1359, 1439); others stated they had been told to make the kickbacks if they wished to make sales to the Board (V Tr. 911-917, 1069; VI Tr. 1103-1105, 1174-1175, 1262, 1290-1293,

1312-1315). Payments made as a result of fear of financial loss are precisely what Congress intended to reach under the extortion provision of the Hobbs Act. See, *e.g.*, *United States* v. *Iozzi*, 420 F. 2d 512 (C.A. 4), certiorari denied 402 U.S. 943; *United States* v. *Tropiano*, 418 F. 2d 1069 (C.A. 2), certiorari denied, 397 U.S. 1021; *United States* v. *Kramer*, 355 F. 2d 891 (C.A. 7) reversed on other grounds, 384 U.S. 100. Contrary to petitioner's claim, the fact that in some instances the fear of economic loss was traced to the conspirators' course of conduct over several years, rather than to a specified threat made at a particular time, does not remove from the statutory prohibition the exploitation of the fear to collect kickback payments. *Callanan* v. *United States*, 223 F. 2d 171 (C.A.8), certiorari denied, 350 U.S. 862.[4]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1973.

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[4]Petitioner's claim that the court of appeals violated his rights in failing to write an opinion is baseless. There is no requirement that an appellate court write an opinion; obviously the court below was of the view that the issues raised were so insubstantial as not to warrant formal discussion.